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Hemraj & Co Sdn Bhd v Tenaga Nasional Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-65-11 OF 2021(W)
ABDUL RAHMAN SEBLI, ZABARIAH YUSOF AND HASNAH HASHIM FCJJ
13 DECEMBER 2022

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Tort — Negligence — Non-delegable duty of care — Respondent claimed for costs and expenses incurred for emergency repairs and replacement of its underground cable which was damaged due to excavation works carried out by independent contractors hired by appellant in front of appellant's house D *— Whether routine residential construction work carried out by appellant through its independent contractors was so extraordinarily hazardous as to impose non-delegable duty of care on appellant to respondent for negligence of its independent contractors — Whether there was special relationship between appellant and respondent which satisfied criteria of 'second category' described in* E *Woodland v Essex County Council [2014] 1 All ER 482 such as to impose non-delegable duty of care on appellant in respect of negligence of its independent contractors — Whether non-delegable duty of care was cause of action that must be expressly pleaded particularising basis on which duty was said to arise*

F This was an appeal against the decision of the courts below which found liability against the appellant ('first defendant') for negligence premised upon the breach of non-delegable duty of care of the respondent ('plaintiff'). The plaintiff ie Tenaga Nasional Bhd ('TNB') claimed for costs and expenses incurred for emergency repairs and replacement of its underground cable, G which was damaged due to excavation works carried out by third-party contractors hired by the defendants, in front of a house belonging to the defendants. The excavation works was to connect the septic tank of the house to the main public sewerage system. The plaintiff contended that the excavation works on a public road where various underground cables and pipes H may be located was an inherently hazardous and a dangerous activity. The plaintiff claimed that since the defendants appointed the third parties as consultants and contractors, for the excavation, the defendants owed the plaintiff, a non-delegable duty of care. Consequently, the plaintiff claimed that the defendants were liable for the negligence of their appointed I consultants/contractors. The defendants took third party proceedings for indemnity against the consultants and contractors which were hired by the defendants to do the excavation works. The High Court held that: (a) the first defendant owed a non-delegable duty of care to the plaintiff and therefore liable for the loss and expense incurred by the plaintiff; (b) the claim against the

second defendant was dismissed; and (c) the third parties was ordered to be jointly and severally liable to indemnify the first defendant for the total amount of damages and the net costs that was awarded against the first defendant in the suit. The Court of Appeal affirmed the findings of the High Court. Hence, this appeal. Leave to appeal was granted to the first defendant upon the following questions of law: (i) question 1: whether as a matter of policy, routine residential construction work carried out by a homeowner through its independent contractors was so extraordinarily hazardous as to impose a non-delegable duty of care on the homeowner to a public utilities company, namely TNB for the negligence of those independent contractors; (ii) question 2: whether there was a special relationship between the homeowner and TNB which satisfied the criteria of the 'second category' described in *Woodland v Essex County Council* [2014] 1 All ER 482 such as to impose a non-delegable duty of care on the homeowner in respect of the negligence of its independent contractors; and (iii) question 3: whether non-delegable duty of care was a cause of action that must be expressly pleaded particularising the basis on which the duty was said to arise or whether it was a matter of law which may be raised during submissions.

Held, allowing the appeal:

(1) The excavation works did not attract the imposition of the non-delegable duty of care. Applying the approach taken in *Biffa Waste Services Ltd v Maschinenfabrik Ernsk Hese GMBH* [2009] 3 WLR 3242 ('Biffa Waste'), if proper precautions had been taken, the activity of excavation works for the sewage connection was not extraordinarily hazardous. The Court of Appeal had erred when it failed to take into account any of the relevant factors leading to the imposition of the duty for the excavation works carried out by the third-party contractors of the defendants. All licenses were either issued or were required to be issued to the consultants and contractors (third parties). They were not required to be issued to the defendants, as homeowners. Further, s 37(12)(a) of the Electricity Supply Act 1990 could not be construed to impose a non-delegable duty of care on the part of the homeowner. Neither did it state that it was the duty of homeowners to obtain approval from TNB. The Court of Appeal fell into error when it imposed a blanket duty on the basis that this appeal fell into the 'highway and hazard' category without alluding to established principles in case law authorities. The fact that the works were carried out near a highway was not the issue. There was no evidence that there was a particular risk from the renovation works that remained substantial even if the renovation works were done properly. The excavation works carried out by the independent contractors were routine residential construction works carried out by a homeowner through its independent contractors could not be described as extraordinarily hazardous activity, whereby the homeowner owed a non-delegable duty of care, to a public utilities

company, namely the plaintiff, TNB for the negligence of those independent contractors. As a matter of policy, from a risk allocation point of view, it would not be fair, just and reasonable to hold that routine residential construction works were subjected to non-delegable duty as this would expose homeowners to an indeterminate liability for the tortious acts of their independent contractors, whose manner of work were beyond their control. Therefore, question 1 was answered in the negative (see paras 60, 63, 70, 72, 76–78 & 80–81).

(2) The principle of non-delegable duty of care was the imposition of a positive duty to protect one from harm. The phrase 'the positive duty to protect another from harm' was not to be confused with the defining features of the special relationship which existed in establishing the second category of cases. Hence, there was no issue of the Court of Appeal conflating the first and the second categories. Question 2 did not reflect the decision of the Court of Appeal as the issue of a special relationship between the homeowner and TNB did not arise. Therefore, question 2 was declined to be answered (see paras 84–88).

(3) The plaintiff had sufficiently pleaded the essence of a non-delegable duty of care. Hence, question 3 was declined to be answered (see paras 92–93).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan mahkamah bawahan yang mendapati liabiliti terhadap perayu ('defendan pertama') kerana kecuaian yang berasaskan pelanggaran kewajipan berjaga-jaga tidak boleh diwakilkan terhadap responden ('plaintif'). Plaintif iaitu Tenaga Nasional Bhd ('TNB') menuntut kos dan perbelanjaan yang ditanggung untuk pembaikan kecemasan dan penggantian kabel bawah tanahnya, yang rosak akibat kerja-kerja penggalian yang dilakukan oleh kontraktor pihak ketiga yang diupah oleh defendan, di hadapan sebuah rumah kepunyaan defendan. Kerja-kerja penggalian adalah untuk menyambungkan tangki septik rumah dengan sistem pembetungan awam utama. Plaintif berhujah bahawa kerja-kerja penggalian di jalan awam di mana pelbagai kabel dan paip bawah tanah mungkin terletak adalah aktiviti yang sememangnya berisiko dan berbahaya. Plaintif mendakwa bahawa oleh kerana defendan melantik pihak ketiga sebagai perunding dan kontraktor, untuk penggalian, defendan mempunyai dengan plaintif, kewajipan berjaga-jaga tidak boleh diwakilkan. Oleh itu, plaintif mendakwa bahawa defendan bertanggungjawab di atas kecuaian perunding/kontraktor yang dilantik. Defendan meneruskan prosiding pihak ketiga untuk ganti rugi terhadap perunding dan kontraktor yang diupah oleh defendan untuk melakukan kerja-kerja penggalian. Mahkamah Tinggi memutuskan bahawa: (a) defendan pertama mempunyai kewajipan berjaga-jaga tidak boleh diwakilkan kepada plaintif dan oleh itu bertanggungjawab ke atas kerugian dan perbelanjaan yang ditanggung oleh plaintif; (b) tuntutan terhadap defendan kedua telah ditolak; dan (c) pihak ketiga diperintahkan untuk

bertanggungjawab secara bersama dan berasingan untuk menanggung rugi defendan pertama untuk jumlah ganti rugi dan kos bersih yang diawardkan terhadap defendan pertama dalam saman itu. Mahkamah Rayuan mengesahkan dapatan Mahkamah Tinggi. Oleh itu, rayuan ini. Kebenaran untuk merayu telah diberikan kepada defendan pertama atas persoalan undang-undang berikut: (i) soalan 1: sama ada mengikut polisi, kerja pembinaan kediaman rutin yang dijalankan oleh pemilik rumah melalui kontraktor bebasnya adalah sangat berbahaya sehingga mengenakan kewajipan berjaga-jaga tidak boleh diwakilkan ke atas pemilik rumah kepada syarikat kemudahan awam, iaitu TNB atas kecuaian kontraktor bebas tersebut; (ii) soalan 2: sama ada terdapat hubungan istimewa antara pemilik rumah dan TNB yang memenuhi kriteria 'kategori kedua' yang diterangkan dalam *Woodland v Essex County Council* [2014] 1 All ER 482 untuk mengenakan kewajipan berjaga-jaga tidak boleh diwakilkan ke atas pemilik rumah berkenaan dengan kecuaian kontraktor bebasnya; dan (iii) soalan 3: sama ada kewajipan berjaga-jaga tidak boleh diwakilkan adalah kausa tindakan yang mesti diplid secara nyata dengan memperincikan asas kewajipan itu dikatakan timbul atau sama ada ia adalah perkara undang-undang yang mungkin dibangkitkan semasa hujahan.

Diputuskan, membenarkan rayuan:

(1) Kerja-kerja penggalian tidak menarik pengenaan kewajipan berjaga-jaga tidak boleh diwakilkan. Menggunakan pendekatan yang diambil dalam *Biffa Waste Services Ltd v Maschinenfabrik Ernsk Hese GMBH* [2009] 3 WLR 3242 ('Biffa Waste'), jika langkah berjaga-jaga yang sewajarnya telah diambil, aktiviti kerja-kerja penggalian untuk sambungan kumbahan tidaklah berbahaya. Mahkamah Rayuan telah terkhilaf apabila gagal mengambil kira mana-mana faktor berkaitan yang membawa kepada pengenaan kewajipan bagi kerja-kerja penggalian yang dijalankan oleh kontraktor pihak ketiga defendan. Semua lesen sama ada telah dikeluarkan atau perlu dikeluarkan kepada perunding dan kontraktor (pihak ketiga). Mereka tidak perlu dikeluarkan kepada defendan, sebagai pemilik rumah. Selanjutnya, s 37(12)(a) Akta Bekalan Elektrik 1990 tidak boleh ditafsirkan sebagai mengenakan kewajipan berjaga-jaga tidak boleh diwakilkan di pihak pemilik rumah. Ia juga tidak menyatakan bahawa adalah menjadi kewajipan pemilik rumah untuk mendapatkan kelulusan daripada TNB. Mahkamah Rayuan terkhilaf apabila mengenakan kewajipan menyeluruh atas dasar rayuan ini termasuk dalam kategori 'lebuh raya dan bahaya' tanpa merujuk kepada prinsip yang ditetapkan dalam autoriti kes undang-undang. Hakikat bahawa kerja-kerja itu dijalankan berhampiran lebuh raya bukanlah isunya. Tiada keterangan bahawa terdapat risiko tertentu daripada kerja-kerja pengubahsuaian yang kekal besar walaupun kerja-kerja pengubahsuaian dilakukan dengan betul. Kerja-kerja penggalian yang

dijalankan oleh kontraktor bebas adalah kerja pembinaan kediaman rutin yang dijalankan oleh pemilik rumah melalui kontraktor bebasnya tidak boleh digambarkan sebagai aktiviti yang luar biasa berbahaya, di mana pemilik rumah mempunyai kewajipan berjaga-jaga tidak boleh diwakilkan, kepada syarikat kemudahan awam, iaitu plaintif, TNB atas kecuaian kontraktor bebas tersebut. Mengikut polisi, dari sudut peruntukan risiko, adalah tidak adil, saksama dan munasabah untuk menganggap bahawa kerja pembinaan kediaman rutin tertakluk kepada kewajipan berjaga-jaga tidak boleh diwakilkan kerana ini akan mendedahkan pemilik rumah kepada liabiliti yang tidak dapat ditentukan untuk kelakuan tort daripada kontraktor bebas mereka, yang cara kerjanya di luar kawalan mereka. Oleh itu, Soalan 1 dijawab secara negatif (lihat perenggan 60, 63, 70, 72, 76–78 & 80–81).

(2) Prinsip kewajipan berjaga-jaga tidak boleh diwakilkan ialah pengenaan kewajipan positif untuk melindungi seseorang daripada bahaya. Ungkapan 'kewajipan positif untuk melindungi orang lain daripada bahaya' tidak boleh dikelirukan dengan ciri-ciri yang menentukan hubungan istimewa yang wujud dalam membuktikan kes kategori kedua. Oleh itu, tiada isu Mahkamah Rayuan menggabungkan kategori pertama dan kedua. Soalan 2 tidak menggambarkan keputusan Mahkamah Rayuan kerana isu hubungan istimewa antara pemilik rumah dan TNB tidak timbul. Oleh itu, soalan 2 ditolak untuk dijawab (lihat perenggan 84–88).

(3) Plaintif telah memplid dengan secukupnya intipati kewajipan berjaga-jaga tidak boleh diwakilkan. Oleh itu, soalan 3 ditolak untuk dijawab (lihat perenggan 92–93).]

Cases referred to

Biffa Waste Services Ltd and another v Maschinenfabrik Ernst Hese GMBH and another [2008] EWHC 6; [2009] 3 WLR 3242, CA (folld)
Bower v Peate [1876] 1 QBD 321, KBD (refd)
Cassidy v Minister of Health [1951] 2 KB 343, CA (refd)
Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor [1993] 2 MLJ 234, SC (refd)
Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 218, FC (distd)
Dr Kok Choong Seng & Anor v Soo Cheng Lin and anor appeal [2018] 1 MLJ 685, FC (distd)
Farraj v King's Healthcare NHS Trust [2010] 1 WLR 2139, CA (refd)
Gold and Others v Essex County Council [1942] 2 All ER 237, CA (refd)
Holliday v National Telephone Co [1895-99] All ER Rep 359, CA (refd)
Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd [1934] 1 KB 191, CA (refd)
Hughes v Percival [1883] 8 App Cas 443, HL (refd)

Kondis v State Transport Authority [1984] 154 CLR 672, HC (refd)
Leichhardt Municipal Council v Montgomery [2007] 230 CLR 22, HC (refd)
Mehrzad Nabavieh & Anor v Chong Shao Fen & Anor and another appeal [2016] 3 MLJ 500, CA (refd)
Ng Huat Seng and another v Munib Mohammad Madni and another [2017] SGCA 58, CA (distd)
Penny v Wimbledon UDC and Iles [1899] 2 QB 72, CA (refd)
Pickard v Smith [1861–73] All ER Rep 204; [1861] 10 CB (NS) 470 (refd)
Public Works Comrs v Angus & Co, Dalton v Angus & Co [1881] 6 App Cas 740, HL (refd)
Read v J Lyons & Co Ltd [1947] AC 156, HL (refd)
Rylands v Fletcher (1868) LR 3 HL 330, HL (refd)
Steven v Bordribb Sawmilling Co Pty [1986] ALJR 184, HC (refd)
Stoneman v Lyons (1975) 8 ALR 173, HC (refd)
Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor [2018] 1 MLJ 810; [2017] 6 CLJ 356, CA (refd)
Woodland v Essex County Council [2013] UKSC 66, SC (folld)

Legislation referred to

Electricity Supply Act 1990 ss 37(12), (12)(a), (12)(b), 41

Appeal from: *Hemraj & Co Sdn Bhd & Anor v Tenaga Nasional Bhd & Ors* [2022] 4 MLJ 608 (Court of Appeal, Putrajaya)

Manuel David Morais (with Pavitra Pillai, Norliza bt Rasool Khan and Deyvinah Ganesalingam) (Liza Khan Chambers) for the appellant.
Balvinder Singh Kenth (with Delveena Kaur Sidhu) (Kenth Partnership) for the respondent.

Zabariah Yusof FCJ:

[1] The appeal before us turns on the decision of the courts below which found liability against the appellant for negligence premised upon the breach of non-delegable duty of care of the respondent.

[2] Leave to appeal was granted by this court to the appellant upon the following questions of law:

> Question 1: Whether as a matter of policy, routine residential construction work carried out by a homeowner through its independent contractors is so extraordinarily hazardous as to impose a non-delegable duty of care on the homeowner to a public utilities company, namely TNB for the negligence of those independent contractors?
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> Question 2: If the answer to the 1st question is in the negative, whether there is a special relationship between the homeowner and TNB which satisfies the criteria of

A the '2nd category' described in *Woodland v Essex County Council* [2014] 1 All ER 482 such as to impose a non-delegable duty of care on the homeowner in respect of the negligence of its independent contractors?

Question 3: Whether non-delegable duty of care is a cause of action that must be expressly pleaded particularising the basis on which the duty is said to arise or B whether it is a matter of law which may be raised during submissions?

[3] The appellant is the first defendant ('D1') and the respondent is the plaintiff in the High Court below. In this judgment, parties will be referred to, C as they were in the High Court.

[4] The second defendant ('D2') and the third parties are not parties in the appeal before us.

D BACKGROUND

[5] The facts are uncomplicated, but the application of the law in the imposition of a non-delegable duty of care in the present appeal is of much concern. The plaintiff, Tenaga Nasional Bhd claims for costs and expenses E incurred for emergency repairs and replacement of its underground cable, which was damaged due to excavation works carried out by third-party contractors hired by the defendants, in front of a house belonging to the defendants. The excavation works was to connect the septic tank of the house to the main public sewerage system.

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[6] D2 is the director of D1 together with his mother and sister.

[7] The plaintiff contends that the excavation works on a public road where various underground cables and pipes may be located is an inherently G hazardous and a dangerous activity. The plaintiff claims that since the defendants appointed the third parties as consultants and contractors, for the excavation, the defendants owe the plaintiff, a non-delegable duty of care. Consequently, the plaintiff claims that the defendants are liable for the negligence of their appointed consultants/contractors. H

[8] The relief sought by the plaintiff against the defendants are:

(a) special damages being the cost of repair and reinstatement works for the damage to the underground cable in the sum of RM3,110,446.09;

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(b) a sum of RM777,711.52 being 25% of the costs of repairs which represents the plaintiff's administrative costs; and

(c) general damages for negligence, willful neglect and breach of duty, interests and costs.

(para 21 of the statement of claim)

[9] The defendants took third party proceedings for indemnity against the consultants and contractors which were hired by the defendants to do the excavation works, namely, Christopher Low Weng Cheong ('TP1'), Hiap Leck Construction & Trading (M) Sdn Bhd ('TP2') and Lau Hor Teck ('TP3').

ISSUE

[10] The main thrust of the appeal is whether D1 owe a non-delegable duty of care to the plaintiff — a personal duty to ensure that reasonable care was taken by the third party contractors in doing the said excavation works.

FINDINGS OF THE HIGH COURT

[11] The High Court found that D1 owes a non-delegable duty of care to the plaintiff and therefore liable for the loss and expense incurred by the plaintiff.

[12] The claim against D2 was dismissed with costs.

[13] As for the defendants' claim against the third parties, the High Court ordered TP1, TP2 and TP3 to be jointly and severally liable to indemnify D1 for the total amount of damages and the net costs that was awarded against D1 in the suit, and further ordered that such liability for indemnity is to accrue with effect from the date when D1 pays to the plaintiff, the judgment sum inclusive of the net costs.

[14] The essential findings of the High Court are, inter alia:

(a) TP1, TP2, TP3 are independent contractors and that the defendants are in no position to control the manner in which TP1, TP2 and TP3 carried out their works. This case is an exception to the general rule that an employer is not liable for the negligent acts of an independent contractor (para 117 of the judgment);

(b) the immediate tortfeasors are TP3 who hired a back-hoe operator and supervised the excavation. TP1, was found to be an experienced sewerage contractor by the High Court, must also be liable as he ought to have done utility mapping or should have insisted LCS Engineering, the consultant, to procure the utility map from the plaintiff. TP1 knew there is no permit from DBKL but insisted TP3 to continue the excavation works (para 134 of the judgment). TP1 was also found to be blatantly negligent (para 152 of the judgment);

(c) D1 and its contractors needed approval from DBKL for the excavation work. The application was submitted a day before the incident and was approved after the incident occurred. This means that the excavation work was done illegally;

(d) LCS Engineering as the consultant engineer, is found to be a joint tortfeasor, ought to have obtained approval from the utility bodies but failed to advise D1 and D2 and the contractors of the same. The learned High Court judge noted that LCS Engineering was not brought as a third party or fourth party for some inexplicable reason (para 136 of the judgment).

(e) in this case, the non-delegable duty of care on the part of D1 can be inferred from the fact that D1 had taken insurance cover to insure against the risk of damage to 'surrounding property'. D1 was also under a contractual obligation to comply with the precondition for the insurance policy to enquire with the relevant authority about the exact position of the cables and to take necessary steps to avoid damage to the same (para 131 of the judgment);

(f) as the employer and owner of the sewerage connection work and the applicant of the policy, it was incumbent upon D1 via D2 to have read the conditions of the policy which include getting the relevant authorities' approval. It was clear negligence and breach of duty of care by D1 through its engineer and contractors. D1 is indeed under a non-delegable duty of care and is therefore liable for negligence together with the other tortfeasors namely the third parties even though they are independent contractors (para 132 of the judgment); and

(g) D2 is not liable for the negligence of D1's independent contractors' and D2 was merely a director of D1 who was carrying out his duty in that capacity and acting as per D1's resolution dated 22 August 2011 authorising D2 to do the necessaries to ensure that the renovation project including the sewerage connection is completed. Any redress that arose from the dispute should be against D1 only and not D2 personally (paras 142 and 150 of the judgment).

FINDINGS OF THE COURT OF APPEAL

[15] The defendants relied on *Biffa Waste Services Ltd and another v Maschinenfabrik Ernst Hese GMBH and another* [2008] EWHC 6; [2009] 3 WLR 3242 ('Biffawaste') and *Mehrzad Nabavieh & Anor v Chong Shao Fen & Anor and another appeal* [2016] 3 MLJ 500 ('Mehrzad'), to support their contention that they were not under a non-delegable duty of care to the plaintiff. The Court of Appeal were of the view that the holding of the two courts in those two cases that the defendants therein were not under a non-delegable duty of care to the claimants, are distinguishable on its facts with

the present appeal. Those cases did not involve unlawful and illegal excavation on a public road.

[16] The Court of Appeal equated the facts of the present appeal to the facts in *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* [2018] 1 MLJ 810; [2017] 6 CLJ 356 ('SYABAS') which the learned trial judge was correct in applying.

[17] The Court of Appeal affirmed the findings of the High Court. In this judgment we will focus on the findings pertaining to the breach of non-delegable duty of care by the defendant with particular reference to para 42 of the Court of Appeal's judgment which reads:

> [41] ... We are of the considered opinion that the duty imposed on Hemraj *is a positive duty to protect TNB underground cables* and subsequently to the public, who are users of electricity distributed/transmitted via the underground cable. A such, we find this appeal falls within *Category 1* of the doctrine of non-delegable duty of care, in relation to *highway and hazard cases*.
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> (Note: Hemraj is D1 as referred to, in this appeal)

[18] We will address these findings of the Court of Appeal, with special reference to the highlighted words, as those words, according to D1 in its submissions, constitute an error on the part of the Court of Appeal in the imposition of the non-delegable duty of care against D1, because it had allegedly conflated the first category and the second category of the principle of non-delegable duty of care as formulated by Lord Sumption in *Woodland v Essex County Council* [2013] UKSC 66 (Woodland).

THE LAW ON THE PRINCIPLE OF DELEGABLE DUTY OF CARE

[19] Liability in the tort of negligence is contingent on personal fault and a defendant would generally not be personally liable for the act of another. Non-delegable duty of care is a derogation from this fault-based principle.

[20] Non-delegable duty of care is a common law tort, the principle of which, a defendant who delegates the performance of its integral duty to an independent contractor, will invariably be held liable for the negligence of the independent contractor. It imposes a personal duty on the defendant to procure the careful performance of its integral work delegated to others. It is a term used to denote a duty which cannot be discharged by entrusting its performance to an independent contractor.

[21] The application of this principle of non-delegable duty of care is not without its flaws. While it has been a recognised part of tort law close to 150

years, there has not been a legally coherent and comprehensive framework articulated on the application of this principle. The first reported case on non-delegable duty is the 19th Century English case of *Pickard v Smith* [1861–73] All ER Rep 204; [1861] 10 CB (NS) 470 where the defendant, Smith was the occupier of a refreshment room and coal cellar on a railway platform. The trap door to the cellar was left open by servants of a coal merchant who had been delivering coal for Smith. The plaintiff, Pickard, a train passenger, fell through the trap door, which the coal merchant's servants had negligently left opened. In holding Smith liable for the injuries sustained by Pickard, William J said:

> ... if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable ... That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned.

William J placed great emphasis upon 'the danger that had been created' by leaving open the trap door.

[22] This proposition of the 'creation of danger or risk' in imposing the non-delegable duty of care in *Pickard v Smith* was subsequently adopted in other cases as in:

(a) *Bower v Peate* [1876] 1 QBD 321 at p 326, per Cockburn LJ:

> a man who orders a work to be executed, from which the natural course of things, injurious consequences to his neighbor must be expected to arise unless means are adopted by which such consequences may be prevented is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the danger arises or some independent person, to do what is necessary to prevent the act he had ordered to be done from becoming wrongful.

(b) *Public Works Comrs v Angus & Co, Dalton v Angus & Co* [1881] 6 App Cas 740 at p 829 as per Lord Blackburn:

> a person causing something to be done, the doing of which casts on him a duty cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor

(c) *Hughes v Percival* [1883] 8 App Cas 443 at p 445 per Lord Blackburn:

> I think the law cast upon the defendant when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went so far as to require

> him to see that reasonable skill and care were exercised in those operations which involved a use of party wall, exposing it to this risk. If such a duty was cast upon the defendant he could not get rid of the responsibility by delegating the performance of it to a third person.

[23] However, these decisions, have been criticised on the ground that, while they explained the nature and the consequences of a non-delegable duty, they failed to give any indication of the circumstances in which such a duty will arise, or the rationale for its imposition. This resulted on decisions founded on arbitrary distinctions between ordinary and extraordinary hazards.

[24] The principle was then applied more broadly by Slesser J in the Court of Appeal case of *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191 ('Honeywill') to 'extra hazardous' operations between ordinary and extraordinary hazards. Slesser J after referring to 'the special rules which apply to extra hazardous or dangerous operations' said that 'the rule of liability for independent contractors' act attaches to these operations, because they are inherently dangerous, and hence are done at the principal employer's peril.

[25] The English Court of Appeal's decision of *Honeywill* had imposed a non-delegable duty on the principal where the act done was 'ultra-hazardous' in its intrinsic nature. Slesser LJ said:

> It is clear that the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve dangers to others if negligently done. The incidence of liability is limited to certain defined classes, and for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special dangers to others.

[26] Slesser J's statement has been interpreted by subsequent decisions as establishing strict liability in a special classes of cases involving 'extra hazardous acts'. However, the ambit of an act which was ultra-hazardous as enunciated in *Honeywill* had been criticised because:

(a) of its broad and uncertain nature of the principle;

(b) it created an untenable distinction between acts that were 'inherent dangerous' and acts that were not, with special rules of absolute liability applying to the former; and

(c) it provides an irrational approach as it includes factors that increase the hazard but exclude from consideration precautionary measures that reduce the hazard.

[27] A simple example would be the act of driving a car. The act of driving

A cannot be said to be inherently hazardous if a proper look out is maintained. The precaution of keeping a lookout is an intrinsic part of the activity of driving.

B **[28]** The High Court of Australia in *Stoneman v Lyons* (1975) 8 ALR 173 and *Steven v Bordribb Sawmilling Co Pty* [1986] ALJR 184 rejected outright the idea of a separate category of extra hazardous acts. Mason J reiterated that it had been rejected by the House of Lords in *Read v J Lyons & Co Ltd* [1947] AC 156 as per Lord Simmonds:

C > I would reject the idea that if a man carries on a so called ultra hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability for its consequences to all men everywhere'. This was simply due to the difficulty of ascertaining what acts are extra hazardous and what is not. Mason J in *Steven v Bordribb* preferred to adopt the traditional common law response to the creation of danger was 'not to impose strict liability but to insist on a higher
D > standard of care in the performance of an existing duty' ([1986] 60 AJLR at p 199).

[29] Subsequently, Stanley Burton LJ in the English Court of Appeal in *Biffa Waste* ruled that the principle in *Honeywill* was regarded as being so unsatisfactory, that its application was to be kept as narrow as possible. He
E watered down the *Honeywill* effect and had reformulated the doctrine to acts which are 'exceptionally dangerous whatever precautions are taken'. The Court of Appeal held that there cannot be strict categorisation of what activity is dangerous and what is not. Essentially, it is impossible to define 'extra hazardous' with sufficient precision.

F **[30]** Hence, the *Biffa Waste* approach, namely, the doctrine applies to acts which are 'exceptionally dangerous whatever precautions are taken', is the preferred approach as it alleviate the difficulties of distinguishing activities that
G are inherently dangerous and one which are not. We are of the view that the approach by *Biffa Waste* provides a practical and definitive guide in the determination of what would constitute an ultra hazardous act. In *Biffa Waste* it was held that the activity that had to be assessed was welding per se, not welding in the vicinity of unwetted combustible material. Welding per se is not
H a hazardous activity. The judge was held to have erred in taken into consideration factors that rendered welding hazardous that were out of control of the defendant, at the same time ignoring the factors that could have rendered it safe. Our Court of Appeal in *Mehrzad* also preferred the *Biffa Waste* approach.

I **[31]** In 2013, Lord Sumption delivered the UK Supreme Court decision in *Woodland*, where he formulated a framework in which two broad categories of cases where the non-delegable duty of care is imposed, namely:

(a) where the defendant employs an independent contractor to perform

some work which is either *inherently hazardous* or *extraordinarily hazardous* or liable to become so in the course of his work. In such situation the duty of care cannot be delegated to the independent contractor and the principal will remain liable throughout; or

(b) where there exists *special relationships* between the principal and the victim such that the principal is not permitted to delegate his tortious liability to an independent contractor.

[32] The second category entails an assessment of the relationship between the parties to establish, and that relationship created a duty of care between the plaintiff and the defendant which could not be delegated to independent third parties. After drawing the underlying principle from the judgment of Denning LJ in *Cassidy v Minister of Health* [1951] 2 KB 343 and Lord Greene MR in *Gold and Others v Essex County Council* [1942] 2 All ER 237, and from the Australian jurisprudence with particular reference to the case of *Kondis v State Transport Authority* [1984] 154 CLR 672, Lord Sumption in *Woodland* identified five defining features of that relationship to establish whether the non-delegable duty exists, namely:

(a) the claimant is *vulnerable or dependent* of protection of the defendant against the risk of injury. This requires a higher standard of care;

(b) there is *antecedent relationship* between the claimant and the defendant (independent of the negligent act or omission):

(i) which places the claimant in the custody, care of charge of the defendant; and

(ii) from which one can impute to the defendant the assumption of a positive duty to protect the claimant from harm;

(c) the claimant has *no control* over how the defendant performs his obligations personally or through employees or third parties;

(d) the defendant *delegated* to a third party a function which is *an integral part of the positive duty* and the third party is exercising the defendant's custody and care of and control over the defendant; and

(e) the third party has been *negligent in the performance of the very* function delegated to him and not just in some collateral respect.

[33] The fourth defining feature is control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility. An assumption of responsibility may be inferred from the creation of a special risk or a special antecedent relationship between the defendant and the claimant. The assumption of responsibility gives rise to a positive duty to protect the claimant from harm and forms the rationale for imposing a more

onerous duty of care on the defendant. The concept of assumption of responsibility has been posited as the unifying basis that may serve to explain both Lord Sumption's first and second categories (para 36 of *Dr Kok Choong Seng & Anor v Soo Cheng Lin and anor appeal* [2018] 1 MLJ 685). A defendant could not be liable for an independent contractor's negligence unless he delegates to the contractor the very positive duty which he himself has to fulfill.

[34] In *Woodland*, the court further took into consideration that the imposition of the non-delegable duty would not be unfair, just and unreasonable on the plaintiff.

[35] This court in *Dr Kok Choong Seng & Anor* has accepted the guiding principles as refined in *Woodland* as a useful starting point in establishing the imposition of a non-delegable duty of care. This court in the same case also emphasised that as the imposition of this duty is an onerous obligation, it reiterates that the proviso in *Woodland* has to be kept in mind, that such duties should only be imposed where it is fair, just and reasonable to do so, based on the facts and circumstances of the case, developed incrementally from existing categories and consistent with underlying principles.

[36] However, cases like *Dr Kok Choong Seng* and *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 218 as cited by parties in their respective submissions, are limited in the application of the non-delegable duty of care which arises from the *second category of cases which involved special antecedent relationships. These two cases do not deal with the first category of cases ie, cases in which a non-delegable duty of care arises from extraordinary hazardous activity* which results in the creation of special danger.

[37] The Court of Appeal found that the present appeal falls under the first category of cases, namely that the defendant employs an independent contractor to perform some work which is, either *inherently hazardous or extraordinarily hazardous* or liable to become so in the course of his work. Hence, we will address the duty within the first category as enunciated by Lord Sumption.

[38] In the Malaysian jurisprudence, the concept of non-delegable duty of care which arises from an extraordinarily hazardous activity, first arose in the Supreme Court case of *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234 where the plaintiff who was a tenant in the Pekeliling Flats had fallen into the lift shaft which was undergoing repairs and maintenance and there were no warning signage being put up. The maintenance and repair works were carried out by third-party contractors and not by the defendant, DBK, who managed the building. The issue was whether

the liability could be shifted on the defendant's third-party contractors. The Supreme Court imposed a non-delegable duty of care on the defendant as it had carried out an extraordinarily hazardous act involving special danger to users of that lift and could not therefore escape liability by entrusting it to the third party contractors. However, the Supreme Court did not formulate the test, definition or standard to be imposed in the determination of what amounts to an extraordinarily hazardous act.

[39] The Court of Appeal decision in *Mehrzad* confirms the law applicable in this jurisdiction to be the same as in England ie, that a non-delegable duty of care is very much a part of the law of negligence in this jurisdiction. In this case, the appellants and the first respondent, Chong Shao Fen were owners of adjoining pieces of land. The appellants carried out demolition works with the intention of putting up a bungalow. The respondent's complaint was that the demolition works had damaged their property. The High Court found the appellants solely liable on the ground that the duty of care owed by the appellants to the respondents was a non-delegable duty. The others who were sued by the respondents included the architect, the independent contractor employed by the appellants to carry out the demolition works and the civil engineer. The High Court absolved all the others of liability on the respondents' claim.

[40] However, the Court of Appeal held that it cannot be said that the duty of care owed by the appellants was a non-delegable duty of care. The High Court in so holding, failed to provide any explanation except relying on the principle that 'no man can get rid of liability for injury occasioned to another by a wrongful act by seeking to throw the responsibility on an agent whom he has employed to do the act'.

[41] The Court of Appeal observed that the High Court did not afford an opportunity for all parties to submit on the issue including evidence from expert witnesses by both parties in ruling that the appellants were solely liable for breach of their non-delegable duty of care.

[42] Having referred to both *Honeywill* and *Biffa Waste*, the Court of Appeal preferred the approach of the later and opined that it was 'not practical' to have two lists of dangerous and non-dangerous acts.

[43] The Court of Appeal further decided that the imposition of a non-delegable duty should only be done if it were 'fair, just and reasonable' as a matter of judicial policy to do so, by applying the 'fair, just and reasonable' test laid down in *Farraj v King's Healthcare NHS Trust* [2010] 1 WLR 2139 and acknowledged by the Supreme Court in *Woodland*. By doing so, the Court of Appeal held that, on the facts of the case before it, it cannot be said to be 'fair,

just and reasonable' for the appellants to owe a non-delegable duty of care to the defendant. It was held that the defendant NHS Trust did not owe a non-delegable duty of care for the testing of a tissue sample that was sent to an independent laboratory. Dyson LJ said that 'any departure from the general rule as to the liability of an employer/principal for the acts of others had to be justified on policy grounds. If the position were to be otherwise, there was a danger that the general rule would become the exception rather than the rule, and that is not the law'.

[44] In imposing a non-delegable duty of care on D1 in the present appeal, the Court of Appeal held that the learned trial judge had correctly applied the case of *SYABAS*, as the excavation works were executed on a public road making such works hazardous to the public (para 41 of the judgment).

[45] In *SYABAS*, the Court of Appeal found that the laying of water pipes by *SYABAS* fell within the first category of exceptionally hazardous activity. However, in its analysis of this liability, the court embarked on a public policy consideration that public utility bodies providing essential services to the community could not extinguish their duty of care by subcontracting the work to an independent contractor. The determining factor in the decision of *SYABAS* which imposed a non-delegable duty on the part of Syabas were that 'both the appellant (TNB) and the first respondent (Syabas) are public utilities vehicles providing essential services and the excavation works were executed on a public road making such works hazardous to the public' (para 28 of *SYABAS*).

[46] Although the Court of Appeal in *SYABAS* referred to *Woodlands* when deciding that the case fell within the first category of hazardous cases, it failed to appreciate the concerns of Lord Sumption in *Woodland* itself in relation to making a distinction between ordinary and extraordinary hazardous activity. In this regard, we reproduced the relevant part of Lord Sumption's judgment which addressed these concerns:

> [6] English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when and why. There are, however, two broad categories of case which such duty has been held to arise. The first is a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work. The early cases are concerned with the creation of hazards in a public place, generally in circumstances which apart from statutory authority would constitute a public nuisance: see *Pickard v Smith* [11861] 10CBNS 470; [1861] 142 ER 535 (which appears to be the first reported case of non-delegable duty), *Penny v Wimbledon Urban DC* [1898] 2 QB 212 and *Holliday v National Telephone Co* [1899] 2 QB 392; [1895-9] All ER Rep 359. In *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191; [1933] All ER Rep 77, the principle was applied more broadly to 'extra hazardous' operations generally. *Many of these decisions are founded on arbitrary*

> *distinctions between ordinary and extraordinary hazards, which may be ripe for re-examination*. Their justification, if there is one, should probably be found in a special public policy for operations involving exceptional danger to the public. But their difficulties do not need to be considered further in these appeals, because teaching children to swim, while it unquestionably involves risks and calls for precautions, it is not on any view an 'extra-hazardous activity. It can be perfectly satisfactory analysed by reference to ordinary standards of care. (Emphasis added.)

[47] The Court of Appeal in *SYABAS*, in its determination of whether the activities therein was hazardous, failed to further consider the principle as enunciated by Stanley Burton LJ in *Biffawaste*, namely whether the acts are exceptionally dangerous whatever precautions taken. If it is, only then the activity will be considered hazardous within the first category.

[48] The Court of Appeal in *SYABAS* premised its holding on *Holliday v National Telephone Co* [1895-99] All ER Rep 359 and *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234 which concerned statutory bodies providing essential public services, as can be discerned from para 27 of the judgment, as having some similarity in its facts. However, *SYABAS* failed to provide an analysis or consideration of the activity in question.

[49] Given the aforesaid, the case of *SYABAS* does not reflect the correct approach in the application of the principle of non-delegable duty of care as enunciated in *Woodlands* and *Biffa Waste*. In any event as was said by the Court of Appeal in *SYABAS* in its concluding para 128, that the determining factor was based on policy consideration, namely that public utilities bodies providing essential services to the community cannot extinguish their duty by sub-contracting it to an independent contractor. The statutory bodies (TNB and Syabas) could not delegate liability for negligence by their independent contractors where they are authorised to carry out the works. The reliance of the Court of Appeal in the present appeal on *SYABAS* in imposing the non-delegable duty of care is therefore misconceived.

[50] Based on *Woodland*, the correct approach to impose the non-delegable duty of care is to first determine, whether the case falls under either Category 1 or 2. In the case of the first category, following *Biffa Waste*, it is those acts which are 'exceptionally dangerous whatever precautions are taken'. In establishing the second category, it must possessed all five defining features as outlined by Lord Sumption in *Woodland*. Once the category of case has been established, the court would have to further consider whether the imposition of such a duty were fair, just and reasonable as a matter of judicial policy in the local context (refer to *Dr Kok Choong Seng* at para 40).

[51] With the aforesaid approach in mind, we will proceed to answer the questions posed applying the said principle based on the formulation as in *Woodland* and *Biffa Waste*.

DECISION

Question 1

[52] It is the plaintiff's case that their case falls under Category 1, however the plaintiff formulated a further subdivision of Category 1 into:

(a) exceptionally hazardous activities; and

(b) highway and hazard cases.

[53] The plaintiff submitted at para 42 of its written submission in encl 31 that there is a stand alone category of cases known as the 'highway and hazard cases' which was accepted by the Court of Appeal in the present case. The works do not even have to be 'extraordinarily hazardous' for non-delegable duty to apply. It is also submitted by the plaintiff that based on the principles distilled from the applicable law, as applied to the concurrent findings of facts in the present case, non-delegable duty of care was imposed on D1 on the basis that the excavation works which caused damage to the cables were carried out on public road/highway which created a hazard to the public, to utility companies, and to users of such utilities. The Court of Appeal had affirmed the findings made by the High Court and the application of the principle of non-delegable duty of care by the High Court when it held that:

> [41] We are of the considered opinion that there is no misdirection by the learned trial judge with regard to his findings on non-delegable duty of care. We find that the learned trial Judge had correctly applied the case of *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor & Anor*, where the Court of Appeal had applied the principle on non-delegable duty where the excavation works were executed on a public road making such works hazardous to the public.
>
> [42] The same factual matrix is present in the present appeal as the excavation works were also executed on a public road, involving not just exceptional danger to the public but damages and/or inconveniences to the neighbourhood due to damage to the underground cables ... The excavation works, which was executed without the required permits, had damaged TNB cables. We are of the considered opinion that the duty imposed on Hemraj is a positive duty to protect TNB cables and subsequently to the public who are users of electricity distributed/ transmitted via the underground cable. As such, we find *that this appeal falls within Category 1 of the doctrine on delegable duty of care, in relation to highway and hazard cases.*

[54] Hence, it is the plaintiff's stand that once the court establishes that the activity is carried out on a public road or highway that would attract the non-delegable duty of care.

[55] These findings by the Court of Appeal is clearly in error. Based on Lord Sumption's categorisation in *Woodland*, the first category refers to extraordinarily hazardous activities, regardless where the activity is carried out. Lord Sumption in *Woodland* was not creating a new class within the first category, but giving an explanation and examples of the development of the tort in the earlier cases which concerned the creation of hazards in a public place, which would constitute a public nuisance. This can be discerned from the judgment of Lord Sumption when he said:

> [6] English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when and why. There are, however, two broad categories of case which such duty has been held to arise. The first is a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work. *The early cases are concerned with the creation of hazards in a public place, generally in circumstances which apart from statutory authority would constitute a public nuisance*: see *Pickard v Smith* [11861] 10CBNS 470; [1861] 142 ER 535 (which appears to be the first reported case of non-delegable duty), *Penny v Wimbledon Urban DC* [1898] 2 QB 212 and *Holliday v National Telephone Co* [1899] 2 QB 392; [1895-9] All ER Rep 359 ... (Emphasis added.)

[56] There are further examples of non-delegable duties of care, namely, dangerous operations on the highway (see *Penny v Wimbledon UDC and Iles* [1899] 2 QB 72), particularly hazardous operations, the escape of fire, and under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 or nuisance, the employer should be held liable only when he fails to perform his duty to ensure that the contractor take those steps which are reasonably necessary to prevent the harm threatened. The standard of care required of an employer and the contractor will inevitably depend upon the magnitude of the risk involved.

[57] The creation of new categories must be done with caution and must be done by clear analogy to recognized category. Lady Hale in *Woodland* emphasised that the boundaries of the responsibility undertaken may not always be clear cut, but will have to be ascertained on a case by case basis. Her Ladyship stressed the need for caution in developing the law beyond chartered waters (para 27 of *Dr Choong Kok Seng*). The non-delegable duty should only be applied in limited and exceptional circumstances because the doctrine imposes stringent duty and that in many instances, it would be unrealistic or almost impossible for the duty bearer to fulfil the duty in question. Sedley LJ in his judgment in *Farraj v King's Healthcare NHS Trust Farraj v King*'s argued that the principle of non-delegable duty of care was historically developed to cure

some of the ills of a narrowly defined doctrine of vicarious liability in the past, and warned that 'caution is needed in importing the palliative concept of the non-delegable duty into other legal relationships' (p 103).

[58] In any event, premised on *Biffa Waste* which is the preferred approach (in determining whether the activity in question is extraordinarily hazardous), the present thinking is to do away with the categorisation of what is extraordinarily hazardous, which is considered as arbitrary categorisation but to make an assessment of the activity and whether there are precautions available to remove or mitigate the hazard.

[59] If there are available precautions, then the activity will not be described as exceptionally hazardous and does not come within Category 1. However, even if, with the known precautions available, the hazard is still a viable risk, then the activity will be considered exceptionally hazardous within Category 1.

[60] Going back to question 1, whether the construction work carried out by a homeowner through its independent contractors is so extraordinarily hazardous as to impose a non-delegable duty of care on the homeowner; we are of the view that the excavation works undertaken by the plaintiff does not attract the imposition of the non-delegable duty of care, for the following reasons.

[61] Applying the *Biffa Waste*'s test to the facts of our present case, the activity carried out by the plaintiff is the connection of the sewage pipe from the house to the mains. The precautionary measure that ought to have been taken by the third party contractors is the utility mapping exercise before doing any excavation as that would indicate the presence of TNB's underground cable. It is accepted that no utility mapping exercise was done by the third-party contractors in the present case. However, the test is not whether any precautionary measures were taken before the activity was carried out but rather, whether the activity (the excavation and sewage connection works) would remain extraordinarily hazardous, had the utility mapping exercise been carried out.

[62] From the evidence of PW 4, if the utility mapping exercise had been carried out by the third party contractors, the precise location of the TNB's cables would be known, hence this would have prevented the third party contractors from drilling into and damaging the TNB cables. The risk of damage to the TNB cable could have been avoided by conducting the utility mapping exercise.

[63] It therefore follows that, applying the approach taken in *Biffa Waste*, if proper precautions had been taken (ie, the mapping utility exercise before

excavation was done) the activity of excavation works for the sewage connection is not extraordinarily hazardous. The Court of Appeal did not apply the *Biffa Waste* approach in determining whether the activity falls within the first category. The Court of Appeal at para 56 of its judgment instead focused on the fact that the present appeal involved the excavation on the public road that was unlawful and illegal, and further went on to say that the fact that there was failure to conduct the mapping exercise, distinguished the present appeal from the facts in *Biffa Waste*. With the greatest of respect to the Court of Appeal, it failed to appreciate the underlying principle behind *Biffa Waste*.

[64] The Court of Appeal of Singapore in *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] SGCA 58 ('Ng Huat Seng') has further expounded the approach by *Biffa Waste* when it held that, activity is to be considered 'exceptionally dangerous whatever precautions taken', having regard to:

(a) the persistence of material risk of exceptionally serious harm to others arising from the activity in question;

(b) the potential extent of harm if the risk materialises; and

(c) the limited ability to exclude this risk despite exercising reasonable care.

[65] Even applying the considerations as expounded in *Ng Huat Seng* to the facts of the present case, from the evidence of PW4, the persistence of risk of damage to TNB cables in the course of sewage connection works is 'very rare'. It was in evidence that it was very rare for TNB to experience damage to its 132 kV cable as a result of third party activities.

[66] Given that it was the duty of the third party contractors to do the utility mapping exercise, they would have been aware of the underlying cables. This coupled with the low persistence of risk of damage to the TNB cable affirms the fact that the sewage connection works carried out by the house owner is not an extraordinarily hazardous activity.

[67] The Australian High Court in *Stevens v Brodribb* rejected the principle that non-delegable duty of care could be imposed on a principal who engages an independent contractor to carry out extraordinarily hazardous activity and took the position that 'the extent of a duty of care will depend upon the magnitude of the risk involved and its degree of probability'. Given the evidence from PW4, the magnitude of the risk is minimal and the degree of probability of the risk is rare.

[68] The Court of Appeal in the present appeal held at para 42 that 'the duty imposed on Hemraj (D1) is a positive duty to protect TNB cables and subsequently to the public who are users of electricity distributed/transmitted via the underground cable. As such, the Court of Appeal found that 'that this appeal falls within Category 1 of the doctrine on delegable duty of care, in relation to highway and hazard cases'. Of relevance in this respect is the decision of the High Court in Australia in *Leichhardt Municipal Council v Montgomery* [2007] 230 CLR 22 which dealt firstly, with the issue whether the road authority owes a non-delegable duty to the public/road users using the road and secondly, the fundamental nature of a non-delegable duty of care. The High Court answered the first issue in the negative, and as for the second issue, a majority of the court rules that the non-delegable duty of care is not a freestanding tort, but rather a doctrine of strict liability arising in cases of negligence. Kirby J pointed out that unlike the recognised recipients of non-delegable duties, public/road users do not constitute a closed class of persons whose identity is ascertainable in advance and there is not the degree of vulnerability that exists with respect to the hospital patient, employee and school pupil. A further problem was that the doctrine is 'subject to an indeterminate qualification in the case of casual or collateral acts of negligence'. Kirby J also considered that there were significant policy justifications for the rejection of a non-delegable duty in the said case when he said:

> The general rule is that the principal is not liable for the wrongs done by an independent contractor or its employees. It is not easy to see why an exception should be specifically carved out allowing the person injured to recover from a road authority in addition to the normal rights that the person enjoys against the independent contractor posited as the effective cause of the wrong.

[69] The Australian position has been that, where the activity is extra-hazardous, higher standard of care is imposed. It may be delegated to an independent contractor, however, liability will only be imposed on the principal if a special relationship is established (Mason J in *Kondis v State Transport Authority*).

[70] Distilling from the approaches as taken by the English Courts in *Biffa Waste*, the Singaporean court in *Ng Huat Seng* and the Australian Court in *Stevens v Brodribbs*, the Court of Appeal in the present appeal had erred when it failed to take into account any of the relevant factors leading to the imposition of the duty for the excavation works carried out by the third-party contractors of the defendants.

[71] The plaintiff submits that the formal requirements set by the regulatory bodies expressly made the homeowners liable for the damage caused to third parties' utilities as a result of the works. The formal permit requirements set by the regulatory bodies, including IWK and DBKL, also mandated that D1 to

obtain the approval of the utility companies prior to the commencement of the works. D1 did not give notice to TNB, much less obtain prior approval to commencing the works. This duty, according to the plaintiff is also non-delegable. The plaintiff further submits that s 37(12)(a) of the Electricity Supply Act 1990 ('the ESA') imposes a mandatory duty for TNB's approval to be obtained prior to any activity in the vicinity of any TNB's electrical installations. Since the law imposes a strict duty of care on the employer, that duty cannot be discharged to an independent contractor.

[72] We disagree with the submissions of the plaintiff. The facts, in the present appeal show that all licenses were either issued or were required to be issued to the consultants and contractors ('third parties'). They were not required to be issued to the defendants, as homeowners. The DBKL license was issued to the consultant engineers, LCS Engineering and the IWK Approval was issued to the consultant engineers (encl 10 p 1237 and p 1354 respectively). In fact it was also the findings of the High Court at para 128 that it was the engineers who were obliged to obtain the approvals and permits as they have overall supervision of the works:

> [128] LCS Engineering as consultant engineer ought to have obtained approvals from the utility bodies which may be affected by the excavation, including TNB. This included conducting surveys at the sites. PW 4 in his statement explained that the defendants and their engineer and contractors should have contacted TNB to obtain directions and approvals before commencing the excavation works ... DW 7 confirms this but accepts he had failed to advise D1 and D2 and the contractors of the same.

[73] Further, s 37(12)(a) of the ESA which provides:

> No person shall without the lawful authority of the supply authority or the licensee, as the case may be, undertake any work or engage in any activity in the vicinity of any electrical installation or part thereof as may be prescribed, in a manner likely to interfere with any electrical installation or to cause danger to any person or property,

cannot be construed to impose a non-delegable duty of care on the part of the homeowner. Neither does it state that it was the duty of homeowners to obtain approval from TNB. The provision prohibits persons who carry out works in the vicinity of electrical installations without TNB's authority. Failure to obtain such approval attracts a penalty as provided in s 37(12)(b) of the same.

[74] The High Court made findings that the non-delegable duty of care on the part of D1 can be inferred from the insurance policy taken by D1 to insure against the risk of damage to surrounding property. D1 was under a contractual obligation to comply with the pre-condition for the insurance policy.

[75] A perusal of the insurance policy in encl 10 p 1371 discloses that it was taken out as a condition imposed on the DBKL license issued on the Consultant Engineer. It was there that the homeowner was described as the 'Contractor'. But nothing turns on this, as this was done to satisfy the requirements of the Consultant's DBKL license for the consultant to have an all risk contractors insurance policy.

[76] We are of the view that the Court of Appeal fell into error when it imposed a blanket duty on the basis that the present appeal falls into the 'highway and hazard' category without alluding to established principles in case law authorities. These findings certainly falls short of the necessary considerations before imposing the duty under the first category.

[77] Given the aforesaid, applying the principles as enunciated in *Woodland* and *Biffa Waste*, it is evident that the activity of excavation works in this case cannot reasonably be said to be extraordinarily hazardous. Excavations works are routinely done and there is nothing to suggest nor explanation, that despite the exercise of reasonable care, vis a vis the mapping exercise done, there remains a material risk of exceptionally serious harm arising from such excavation works. The fact that the works were carried out near a highway is not the issue. The central issue is whether such excavations works are exceptionally dangerous whatever precautions are taken (*Biffa Waste* at para 78).

[78] In the present appeal, there is no evidence that there is a particular risk from the renovation works that remained substantial even if the renovation works were done properly. We found that the excavation works carried out by the independent contractors were routine residential construction works carried out by a homeowner through its independent contractors cannot be described as extraordinarily hazardous activity, whereby the homeowner owes a non-delegable duty of care, to a public utilities company, namely the plaintiff, TNB for the negligence of those independent contractors.

[79] The *Woodland* categories and the five defining features of the special relationships under the second category are threshold requirements. The determination as to whether the principle of non-delegable duty of care applies, does not however ends there. After fulfilling the threshold requirements, the Court has to further consider whether it is fair and reasonable to impose non-delegable duty of care in the particular circumstances, having regard to policy considerations (see *Dr Kok Choong Seong* and *Merdzhad*).

[80] In the present appeal, as a matter of policy, from a risk allocation point of view, it would not be fair, just and reasonable to hold that routine residential

construction works are subject to non-delegable duty as this would expose homeowners to an indeterminate liability for the tortious acts of their independent contractors, whose manner of work are beyond their control.

[81] Given the aforesaid, we answer question 1 in the negative.

Question 2

Was there a special relationship between the home owner and TNB which satisfies the criteria of the second category as described in *Woodland* such as to impose a non-delegable duty of care on the homeowner in respect of the negligence of its independence contractors?

[82] The plaintiff submits that it is their stand that the facts of the present case give rise to the application of the non-delegable duty of care under the first category of cases. Hence, the question proposed is therefore, unnecessary and has no relevance to the factual matrix of the present case. It submits that the Court of Appeal correctly held that D1's liability falls within the Category 1 of the doctrine of non-delegable duty of care.

[83] D1 submits that the Court of Appeal has conflated the two categories, which is a clear misdirection of law on the part of the Court of Appeal, when it held that our present appeal 'falls within *Category 1* of the doctrine on delegable duty of care, in relation to highway and hazard cases', and that '... the duty imposed on defendant is a *positive duty* to protect TNB cables and subsequently to the public ...' D1 submits that the words '... the duty imposed on defendant is a *positive duty* to protect TNB cables and subsequently to the public ...' are characteristics of *the second category*.

[84] However, we disagree with the submissions by D1 in this respect because we fail to see how such holding by the Court of Appeal amounts to conflating the two categories as enunciated by Lord Sumption. We say this because essentially the principle of non-delegable duty of care is the imposition of a positive duty to protect one from harm, which is the fundamental jurisprudence of the law of negligence. Raus Shariff CJ in *Dr Chong Kok Seng* at para 34 said that:

> [34] The law of negligence is no stranger to the concept of positive duty to protect another from harm. A positive duty to guard against harm caused by a third party may arise from a special relationship between the plaintiff and the defendant, giving rise to an assumption of responsibility by the defendant, or where the risk or a source of danger has been created (*Smith & Others v Littlewoods Organisation Ltd (Chief Constable, Fife Constabulary, third party) and conjoined Appeal* [1987] 1 All ER 710 ... and *Mitchell and another v Glasgow City Council* [2009] AC 874).
>
> ...

> [36] ... An assumption of responsibility may be inferred from the creation of a special risk, or a special antecedent relationship between him and the claimant. *The assumption of responsibility gives rise to a positive duty to protect the claimant from harm*, and forms the rationale for imposing a more onerous duty of care on the defendant. Indeed, the concept of assumption of responsibility has been posited as the unifying basis that may serve to explain both Lord Sumption's first and second categories of cases (see *Murphy, Juridical foundations of common law non-delegable duties* in JW Neyers er et al, *Emerging Issues in Tort Law* (Oxford : Hart, 2007). (Emphasis added.)

[85] The phrase 'the positive duty to protect another from harm' is not to be confused with the defining features of the special relationship which exists in establishing the second category of cases which states:

> The defendant delegated to a third party a function which is an integral part of the positive duty ...

The point or issue under the second category in this respect is not about 'positive duty' per se, but the 'defendant *delegating* to a third party a function which is an integral part of the positive duty of the defendant's'.

[86] Hence, there is no issue of the Court of Appeal conflating the first and the second categories.

[87] Given the aforesaid, the proposed question 2 does not reflect the decision of the Court of Appeal as the issue of a special relationship between the home owner and TNB does not arise.

[88] We therefore decline to answer question 2.

Question 3

Whether non-delegable duty of care is a cause of action that must be expressly pleaded particularising the basis on which the duty is said to arise or whether it is a matter of law which may be raised during submissions?

[89] It is the findings of the Court of Appeal that although the words 'non-delegable duty of care' was not expressly pleaded in para 18 of the statement of claim, the Court of Appeal found that the essence of the duty was sufficiently pleaded. The Court of Appeal said that negligence was alleged not only against the defendants but also against the defendant's contractors, workers and agents. The Court of Appeal found that the particulars were also pleaded.

[90] For completeness, we reproduced para 18 of the SOC:

18. TNB menyatakan bahawa kerugian dan kerosakan kabel bawah tanah tersebut telah disebabkan oleh kecuaian, pengabaian sengaja dan/atau pelanggaran kewajipan oleh Defendan Pertama dan Defendan Ke-2 dan/atau kontraktor-kontraktor, pekerja-pekerja atau agen-agen mereka.

Butir-butir kecuaian

(i) Kegagalan untuk mengambil apa-apa atau apa-apa langkah wajar untuk memaklumkan TNB sebelum memulakan kerja-kerja penggalian untuk memastikan kewujudan kabel bawah tanah tersebut dan untuk mengenal pasti lokasi tepat yang sama di tapak;

(ii) Kegagalan untuk memohon dan/atau mendapat apa-apa kelulusan dan/atau permit yang perlu sebelum memulakan kerja-kerja penggalian;

(iii) Kegagalan untuk mengambil sebarang atau sebarang langkah berjaga-jaga dan langkah yang menasabah dan/atau wajar untuk memastikan bahawa kerja-kerja penggalian telah dijalankan dengan cara yang tidak mendatangkan apa-apa bahaya kepada keselamatan dan integrity kabel bawah tanah tersebut;

(iv) Kegagalan untuk memberi perhatian yang sewajarnya dan/atau sepatutnya kepada kehadiran kabel bawah tanah tersebut semasa menjalankan kerja-kerja penggalian; dan

(v) Menjalankan kerja-kerja penggalian tersebut dengan cara yang menimbulkan satu risiko dan bahaya kepada keselamatan dan integrity kabel bawah tanah tersebut.

[91] We have set out in the preceding paras that the essence of a non-delegable duty is a duty to ensure that care is taken. In *Dr Hari Krishnan & Anor* this court found that the plaintiff in his reply to the hospital's duty of care to the plaintiff is to ensure that a competent standard of practice is exercised during the operation.

[92] In the present appeal, we found that the plaintiff at paras 18(iii) and (iv) of its statement of claim ('SOC') has sufficiently pleaded the essence of a non-delegable duty of care. Question 3 is more factual in nature, depending how the SOC is worded.

[93] The proposed question is fact-driven. Hence, we decline to answer question 3.

CONCLUSION

[94] The findings of both courts below, are that the third party contractors are the tortfeasors for the damage. It is interesting to note that, the orders by the learned trial judge that although D1 was found to owe a non-delegable duty of care to the plaintiff and liable for the loss and expenses incurred by the plaintiff,

the High Court also ordered TP1, TP2 and TP3 to be jointly and severally liable to indemnify D1 for the total amount of damages and the net costs that was awarded against D1 in the suit. At the end of it all, the third party contractors were made to pay for the loss and expenses incurred by the plaintiff. The plaintiff could have taken the direct route to claim for compensation for the damage caused to the underground cable from the third party contractors premised on the normal tortious principles. If it is D1 which is responsible under the non-delegable duty of care, D1 should be paying for the loss and expense to the plaintiff, not the third parties. In any event, it is difficult to see why a special exception should be carved out for the plaintiff in addition to the rights of redress it enjoys under the statutes namely:

(a) s 37(12) of the Electricity Supply Act 1990 prohibits any activity in the vicinity of electrical installation or part thereof in a manner likely to interfere with any electrical installation or to cause danger to any person or property. It provides for criminal penalty; and

(b) s 41 of the Electricity Supply Act 1990 imposes strict liability on any person who damages TNB's property. Any person who commit such an offence may be liable to pay full compensation for the damage he has done.

[95] It would appear that this is one of the cases where the duty of care can be satisfactorily analysed by reference to ordinary standards of care rather than the circuitous imposition of a non-delegable duty of care.

[96] We therefore allow the appeal with costs of RM250,000 to the defendant/appellant subject to allocator. We set aside the decision of the courts below.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh